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Public Policy Exceptions in European Private Law: A New Research Project

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Abstract: Public policy exceptions arguably exist in all fields of private and commercial law, not only in private international law but also in substantive law. In substantive private law, the term ‘public policy exception’ could be used to indicate general illegality rules that make an act of private autonomy (a contract, a testament, etc.) invalid when it conflicts with public policy or good morals. In primary EU law, one may call ‘public policy exceptions’ the derogations from the four freedoms for reasons of public morality, public policy, public security, or public health. Like the *ordre public* exceptions in private international law, the public policy exceptions in substantive private and commercial laws can also be seen as conflict rules. In fact, the public policy exceptions in substantive private law address the conflict between state regulation and policy, on the one hand, and private (self-)regulation and policy, on the other hand. Moreover, the public policy derogations from the four freedoms regulate the conflict between EU and national law and policy. A long-term research project initiated in Groningen aims at a cross-cutting comparison of interpretations and applications of concepts that function as public policy exceptions in different branches of substantive, international, and EU private and commercial law. In particular, this project aims at discovering and comparing the governance aspects, the fundamental rights based aspects, and the social justice aspects of these interpretations and applications.

Resumé: On trouve sans aucun doute des exceptions d’ordre public dans tous les domaines du droit privé et commercial, non seulement en droit international privé mais aussi en droit matériel. En droit privé matériel, le terme ‘exception d’ordre public’ pourrait être utilisé pour indiquer des règles générales d’illicéité invalidant un acte d’autonomie privée (un contrat, un testament etc.) lorsqu’il est contraire à l’ordre public ou aux bonnes mœurs. Dans le droit primaire de l’UE, on peut appeler ‘les exceptions d’ordre public’ les dérogations aux ‘quatre libertés’ pour des raisons de morale publique, d’ordre public, de sécurité publique ou de santé publique. Comme les exceptions d’*ordre public* en droit international privé, les exceptions d’ordre public en droit privé matériel et commercial peuvent aussi être considérées comme des règles de conflit. En fait, les exceptions d’ordre public en droit privé matériel traitent le conflit entre la réglementation et la politique publiques d’une part et l’(auto-)réglementation et la politique privées d’autre part. De plus, les dérogations d’ordre public aux ‘quatre libertés’ règlent le conflit entre le droit et la politique au niveau national et au niveau de l’UE.

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Un projet de recherche à long terme lancé à Groningen vise à établir une comparaison transversale d'interprétations et d'applications de concepts fonctionnant comme exceptions d'ordre public dans différentes branches de droit matériel, international et de droit commercial et privé de l'UE. Ce projet tente en particulier de découvrir et de comparer les aspects de gouvernance, les aspects basés sur les droits fondamentaux et les aspects de justice sociale de ces interprétations et applications.

Zusammenfassung: *Ordre public*-Ausnahmen bestehen in allen Bereichen des Privat- und Wirtschaftsrechts, nicht nur im internationalen Privatrecht sondern auch im materiellen Recht. Im materiellen Privatrecht könnte man den Ausdruck '*ordre public*-Ausnahme' (*public policy exception*) verwenden, um allgemeine Ungültigkeitsregeln zu bezeichnen, die eine privatautonome Handlung (einen Vertrag, ein Testament etc.) nichtig oder anfechtbar machen, sofern diese in Streit mit der öffentlichen Ordnung oder der guten Sitten ist. Im primären EU Recht könnte man von '*ordre public*-Ausnahmen' sprechen, um die zulässigen Einschränkungen der vier Grundfreiheiten aus Gründen der öffentlichen Moral, öffentlichen Ordnung, öffentlichen Sicherheit oder öffentlichen Gesundheit zu bezeichnen. So wie die *ordre public*-Ausnahmen im internationalen Privatrecht können auch die *ordre public*-Ausnahmen im materiellen Privat- und Wirtschaftsrecht als Kollisionsnormen betrachtet werden. Tatsächlich beziehen sich die *ordre public*-Ausnahmen im materiellen Privatrecht auf den Konflikt zwischen staatlichen Zielen und staatlicher Regulierung einerseits und privaten Zielen und privater (Selbst-)Regulierung andererseits. Darüber hinaus regulieren die *ordre public*-Ausnahmen von den vier Grundfreiheiten den Konflikt zwischen EU Recht und Politik und nationalem Recht und Politik.

Ein langfristiges, in Groningen initiiertes Forschungsprojekt zielt auf einen fachgebietsüberschreitenden Vergleich der Auslegungen und Anwendungen der Begriffe, welche als *ordre public*-Ausnahmen in verschiedenen Bereichen des materiellen, internationalen- und EU-Privat- und Wirtschaftsrechts fungieren. Insbesondere zielt dieses Projekt auf die Entdeckung und den Vergleich der Governance-Aspekte, der grundrechtsbezogenen Aspekte und der sozialen Gerechtigkeitsaspekte dieser Auslegungen und Anwendungen.

1. Project Topic: Three Types of Public Policy Exceptions

'Public policy exceptions in European private law' is a long-term research project I initiated in 2012 in collaboration with the Groningen Centre for Law and Governance (GCL) and the Netherlands Institute for Law and Governance (NILG). This project explores the interpretations and applications of *public policy exceptions* in European private and commercial laws. Herewith, I refer to three types of rules:

- (1) Public policy exceptions in *substantive private or commercial law*. With 'public policy exceptions' here I mean general rules which, for the sake of public interests, make an exception from the most general of all private law principles: the legal validity of acts of private autonomy. Such public policy exceptions include general illegality

rules that make a contract, a testament, etc., invalid when it conflicts with public policy or good morals. This project concentrates on such *general* illegality rules. It does *not* address the countless *specific* illegality rules that make private autonomous acts invalid (e.g., invalidity of contracts contrary to statutory provisions).

- (2) Public policy exceptions in *private international law*. These are the classic *ordre public* exceptions to the general rules on the application of foreign laws and the recognition and enforcement of foreign judgments in civil and commercial matters.¹
- (3) Public policy exceptions in *primary EU law*. These are the Treaty provisions allowing for derogations from the four freedoms (free movement of goods, capital, services, and persons) for reasons of public morality, public policy, public security, or public health.²

One may argue that the three above-described categories of rules have much in common, for two reasons. First, all these rules gravitate on the concept of *public policy* intended in a broad sense, including public morality, public security, and public health. Second, all these rules arguably constitute *conflict rules*. The first category of public policy exceptions regulates the conflict between state regulation and policy, on the one hand, and private (self-) regulation and policy, on the other hand.³ The second category of public policy exceptions regulates the conflict between the law and policy of the forum and a *foreign law and policy*. The third category of public policy exceptions regulates the conflict between the four freedoms under EU law and policy, on the one hand, and *national law and policy*, on the other hand.⁴

2. Project Objectives

This project aims at a *cross-cutting comparison* of interpretations and applications of concepts of ‘public policy’, ‘ordre public’, ‘good morals’, or similar concepts

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- 1 See, e.g., Art. 21 ‘Rome I’ (Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations) and Art. 26 ‘Rome II’ (Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations).
 - 2 See Arts 36, 45, 52, and 65 TFEU.
 - 3 On such rules as conflict of law rules in a broad sense, see A. COLOMBI CIACCHI, *Internationales Privatrecht, ordre public européen und Europäische Grundrechte*, ZERP Discussion Paper No. 1/2008.
 - 4 On EU law as conflict of laws, see C. JOERGES, ‘Reconceptualising the Supremacy of EU Law: A Plea for a Supranational Conflict of Laws’, in B. Kohler-Koch & B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Lanham, Maryland: Rowland and Littlefield, 2007), pp. 311 *et seq.*; C. JOERGES, *Unity in Diversity as Europe’s Vocation and Conflict of Laws as Europe’s Constitutional Form*, LEQS Paper No. 28/2010, revised version April 2013.

that function as public policy exceptions in different branches of substantive, international, and EU private and commercial laws. In particular, this project aims at discovering and comparing:

- (a) the *governance* aspects of these interpretations and applications,
- (b) the *fundamental rights based* aspects of these interpretations and applications, and
- (c) the *social justice* aspects of these interpretations and applications.

The first official launch of this project was the international conference ‘Public Policy, Good Morals and Social Justice in European Private Law’, held in Groningen on 26–27 October 2012. More than 20 papers were presented at that conference. They referred to all three above-described contexts where public policy exceptions operate: (1) substantive private and commercial law, (2) private international law, and (3) the four freedoms under EU law.

The above conference intended to introduce this new research project and highlight some of its aspects, especially those related to social justice. Several conference speakers were members of the Study Group on Social Justice on European Private Law (Social Justice Group, SJG).⁵ Other speakers explicitly addressed social justice-related topics in their papers, despite not being members of the SJG.

Apart from this introductory paper, this special issue only includes articles addressing issues of substantive law (including EU law) in a supranational or comparative law perspective. The other conference papers, focusing on either national law or private international law, will be published in a forthcoming book.⁶

3. How Do the Articles in This Issue Relate to the Project Topic?

The first article that follows the present introduction is written by Salvatore Patti. It deals with the interpretation of general clauses of public policy and good morals in European contract law. It starts from the assumption that public policy and good morals are vehicles for social justice, especially in contract law. Patti claims that the traditional doctrines on the interpretation of the law do not fit the interpretation of such open norms, which is more a ‘concretization’ and ‘application’ than an interpretation. The paper then takes a position in favour of the competence of the Court of Justice of the EU to interpret, i.e., concretize such general clauses contained in regulations or directives. Finally, Patti

⁵ See *infra* n. 7.

⁶ A. COLOMBI CIACCHI & A. MCCANN (eds), *Morality and Public Policy in Private Law and Conflict of Laws in Europe* (2015, forthcoming).

highlights the public law influence on the interpretation of ‘public policy’ and ‘good morals’, especially for what concerns the references made to fundamental rights.

The second article, written by Hugh Collins, develops an innovative suggestion contained in the *Manifesto on Social Justice in European Contract Law*⁷ further. It submits that consumers should have the right to rescind purchases of goods produced in violation of human rights and/or minimum international labour standards. Given the reluctance of English law to invoke public policy or immorality to invalidate such socially unjust contracts, Collins explores the possibility of a claim through the law of sales. He argues that in the context of a network society it is possible to discern a transition in the concept of conformity of goods from an analysis of the content of the seller’s promise to an assessment of the buyer’s expectation. In particular, the buyer could reasonably expect the product (including the production process) to comply with the labour standards to which the seller has committed itself in its code of conduct.

In the third article, Lorenz Kähler explores the ways in which public policy considerations can influence the interpretation of contracts. He understands ‘public policy’ in a wide sense, including fundamental moral standards and the protection of the weaker party. He submits that public policy interventions *via* contract interpretation have advantages (flexibility and incentives for the drafting of the contract) but also disadvantages (the hidden way in which public policy interferes with private autonomy). He concludes that such public policy interventions can be normatively justified as long as the intentions of the parties are not distorted.

The fourth article (by Olha Cherednychenko) deals with the interplay of public regulation and traditional contract law in the financial services sector. It addresses the implications of this interplay for the protection of the weaker party. It submits that the shift towards a more policy-oriented and social justice-oriented reasoning in contract law involves the danger of unrestrained instrumentalization of contractual relationships. Focusing on the *ex post* protection of individual weaker parties in the national contract laws, the article pleads for better coordination between the various sites at which contract-related rule-making operates across different fields of contractual practice.

In the fifth article, Teresa Rodríguez de las Heras Ballell explores to what extent the refusal to admit an individual or a business to a social network or e-market can be challenged on grounds of public policy. She submits that such a refusal to deal can entail an abusive exercise of a right ignoring constitutional

7 STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, ‘Social Justice in European Contract Law: A Manifesto’, 10. *European Law Journal* 2004, p. 653 at 668: Since the Charter of Fundamental Rights of the EU prohibits child labour, consumers should have the right to rescind purchases of products made using child labour.

principles and could qualify as anticompetitive exclusionary behaviour resulting in market foreclosure or social marginalization of the user. Therefore, she concludes that private autonomy in electronic markets has to be carefully examined under public policy principles.

The sixth article (by Zeeshan Mansoor) compares the doctrines of invalidity of contracts contrary to public policy and good morals under English and Dutch law. It proposes a new methodology (the ‘principle policy clarification methodology’) for identifying the extent to which divergences and convergences exist between the two jurisdictions, from both the viewpoint of policy considerations and actual results of court decisions. The article applies and exemplifies this methodology with reference to one particular type of contract often deemed contrary to public policy or good morals: agreements concerning matrimony.

The seventh and last article (by Adam McCann) deals with the re-regulatory nature of European economic freedoms and the subsequent effects on national social justice. It examines whether the ECJ/CJEU, in particular, has overprotected economic mobility and contractual autonomy to the detriment of health care, education, and certain fundamental rights. The article does not share the often raised criticism according to which the Court neglects the normative objectives of social justice. It submits instead that the Court understands private economic relations and public law values as necessary complements.

The Groningen conference ‘Public Policy, Good Morals and Social Justice in European Private Law’ was only a first step towards the cross-cutting comparative analysis aimed for by this project. This is a long-term project. It needs a considerable amount of time and resources to mature. Time and patience are necessary components of every in-depth comparative study anyway.